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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARLOS COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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December 1994

26 pp

QUESTION PRESENTED

Whether the military judge erred to the substantial prejudice of the appellant by improperly restricting the defense-cross examination of the government's expert witness.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Carlos Coleman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 29, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at ____ MJ ____ (C.M.A. 1994) (Appendix A). The unreported opinion of the United States Air Force Court of Criminal Appeals, issued on February 23, 1993, is attached (Appendix B).

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on September 29, 1994. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

On 8 and 9 May 1991, the appellant was tried by a General Court-Martial at McClellan Air Force Base, California, on charges of committing indecent acts upon a female under the age of 16 on divers occasions and, in addition, committing the offense of carnal knowledge with the same female on two separate occasions. Notwithstanding his pleas, he was found guilty of committing indecent acts on divers occasions and guilty of attempted carnal knowledge on two occasions.

During the course of appellant's trial, Ms. Julie Holder, a Family Advocate Therapist at the David Grant Medical Center on Travis Air Force Base, testified during the government's case in chief with regard to the Child Abuse Accommodation Syndrome developed by Dr. Roland Summit. Ms. Holder testified that there are as many as five different stages a child goes through once he or she has been sexually abused. After Ms. Holder's direct, the appellant's counsel attempted to cross examine her with an Article by Dr. Lee Coleman, found in the Forum Magazine entitled, "False Allegations of Child Sexual Abuse, How the Experts Have Been Caught With Their Pants Down". Initially, the witness admitted that she was familiar with Dr. Coleman's article and with the work of professionals critical of Dr. Summit's work. Defense counsel then tried to cross examine Ms. Summit by reading various passages from Dr. Coleman's article to her and asking her whether she agreed or disagreed with the comments made therein. At this point, trial counsel objected to defense counsel cross-examining Ms. Holder in such a manner, said objection being sustained by the military judge.

On appeal to the Air Force Court of Criminal Appeals, appellant asserted that the military judge, by granting the trial counsel's objection, effectively deprived him of his Sixth Amendment right to fully cross examine the wit-

nesses against him. In its opinion (Appendix B), the Air Force Court of Criminal Appeals summarily dismissed this issue without comment. The United States Court of Appeals for the Armed Forces granted review on this issue. After hearing argument, the court held that the military judge did not abuse his discretion in denying defense counsel the opportunity to cross-examine Ms. Holder using "hearsay that the defense failed to establish was an authoritative publication."

REASONS FOR GRANTING THE WRIT

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY IMPROPERLY RESTRICTING THE DEFENSE CROSS-EXAMINATION OF THE GOVERNMENT'S EXPERT WITNESS

The military judge erred to the prejudice of the appellant by inappropriately restricting the appellant's Sixth Amendment constitutional, as well as his statutory and evidentiary rights, to fully cross-examine the witnesses against him. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *"Davis v. Alaska,* 415 U.S. 308, 317 (1974). Cross-examination has been described as the "greatest legal engine ever invented for the discovery of truth." *Maryland v. Craig,* 110 S.Ct 3157, 3163 (1990). Specifically, the military judge in the case *sub judice* confused the proper methods of cross-examination and impeachment with Mil.R.Evid. 802 which disallows hearsay at courts-martial unless as provided by the Military Rules of Evidence or by Act of Congress.

Mil. R. Evid. 803(18) provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in

> published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In *Reilly v. Pinkus,* 338 U.S. 269 (1949), this Honorable Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. Quite clearly, Dr. Coleman's article in the Forum magazine was a periodical in that category of learned periodicals encompassed by Mil.R. Evid. 803(18). *See e.g., United States v. Benedict,* 20 M.J. 939, 943 (A.F.C.M.R. 1985). Moreover, because the article was called to the witness's attention, the article could have been read into evidence should the defense counsel have been so inclined. Mil.R. Evid. 803(18). In addition to being admissible evidence, Dr. Coleman's article referenced in defense counsel's cross-examination was proper rebuttal in its own right. He was testing the prosecution's expert witness's espousal of a theory criticized in an article with which the witness was familiar. Indeed, the Court of Appeals for the Armed Forces has defined impeachment as "a process of explaining away a witness's testimony as to the existence of a fact at issue at trial," and one way of achieving this end, the Court noted, was "showing the tribunal the contrary of a witness's asserted fact, so as to raise an inference of a general defective trustworthiness." *United States v. Banker,* 15 M.J. 207, 210 (C.M.A. 1983). *See also* Mil. R. Evid. 607. Finally, the fact that the defense counsel was also attempting to cross-examine Ms. Holder by asking whether or not she agreed with the statements of other experts writing in this field is perfectly proper and

should have been allowed by the military judge over prosecution objection. *See e.g., Banker, supra* at 211 (Court noted defense attempt to adduce contradicting evidence from a witness on cross-examination) *McCormick on Evidence,* § 47 (E. Cleary 3d ed. 1984) (Facts sought to be contradicted can be elicited on cross-examination); Saltzburg, Schnasi, Schlueter, *Military Rules of Evidence Manual* 804 (3d ed. 1991) (The cross-examiner may use the treatise whether or not the expert agrees that it is reliable and whether or not the expert ever has seen the treatise before).

The aforementioned rulings by the military judge irreparably prejudiced the appellant. In *Delaware v. Van Arsdall,* 475 U.S. 684, 685 (1986), this Court set forth the following test to gage the impact of judicial error in limiting cross-examination with regard to previous false statements:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examinations were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. (citations omitted).

The major weapon in the prosecution's arsenal was the issue of whether the testimony of Ms. Brown should be believed. The judge's rulings, cutting off the defense's ability to vigorously challenge the prosecution's attempt to

bolster Ms. Brown's testimony by way of Ms. Holder's expert testimony, gutted the appellant's trial defense. The Court of Appeals for the Armed Forces has emphasized the critical importance of impeachment evidence, citing this Honorable Courts rejection in *United States v. Bagley,* 473 U.S. 667 (1985), of the proposition that there is a distinction between impeachment evidence and exculpatory evidence. *United States v. Eshalomi,* 23 M.J. 12 (C.M.A. 1986). "[T]he government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses," the Court quoted, "constitutes constitutional error of the first magnitude requiring automatic reversal," Id. at 22-23. The same is just as true in this case, where the defense was estopped by the military judge from using evidence necessary for the proper examination of the prosecution's expert witness.

In sum, the members should have been able to consider the testimony of Ms. Holder only after it was properly tested by the crucible of cross-examination. Failure to allow her proper cross-examination gave the prosecution an improper and valuable assist towards securing the appellant's conviction. The defense should have been able to exercise its right to properly examine Ms. Holder, the prosecution's "expert" witness. Denying the appellant this right was akin to denying the appellant the right to a fair trial. *Cf. United States v. Clifton,* 15 M.J. 26 (C.M.A. 1983). This is especially true in light of the fact he was ultimately convicted of a lessor included offense with regard to Charge II.

CONCLUSION

The military judge's improper limitation of the defense opportunity to cross-examine the government's expert witness violated the appellant's Sixth Amendment right to confront and effectively cross-examine the witnesses against him. This abuse of discretion by the military judge

irreparably damaged the defense case. Consequently, this Honorable Court should grant this petition for a Writ of Certiorari

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Counsel of Record

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December 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0920/AF
CMR No. 29450

UNITED STATES, APPELLEE

v.

CARLOS COLEMAN, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued April 19, 1994
Decided Sep. 29, 1994

Counsel

For Appellant: *Captain Eric N. Eklund* (argued); *Colonel Jay L. Cohen* (on brief); *Lieutenant Colonel Frank J. Spinner* and *Captain David D. Jividen*.

For Appellee: *Major Barnard N. Madsen* (argued); *Colonel Jeffery T. Infelise* (on brief).

Military Judge: William C. Thompson, Jr.

Opinion of the Court

WISS, Judge:

Appellant was tried by a general court-martial composed of officer members at McClellan Air Force Base, California, on May 8 and 9, 1991. Contrary to his pleas,

he was found guilty of attempted carnal knowledge (two specifications)[1] and of committing indecent acts upon a child, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 USC §§ 880 and 934, respectively. He was sentenced to a bad-conduct discharge, confinement and forfeiture of $550.00 pay per month for 3 years and reduction to E-1. The convening authority approved the sentence as adjudged, and the Court of Military Review affirmed in an unpublished opinion dated February 23, 1993.

This Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF APPELLANT, BY IMPROPERLY RESTRICTING THE DEFENSE CROSS-EXAMINATION OF A GOVERNMENT EXPERT WITNESS.

We hold that the military judge did not abuse his discretion in denying defense counsel the opportunity to cross-examine a prosecution expert witness using hearsay that the defense failed to establish was an authoritative publication.

I

The victim in this case was a 14-year-old female who testified as to appellant's acts of sexual molestation. The credibility of the victim was the linchpin of the prosecution's case. To support the victim's credibility by explaining why a child may delay or not report these matters and "what is going on through the mind of a [sexually abused] child," the prosecution presented an expert witness. The present issue arises from the military judge's restriction

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[1] Apellant was found not guilty of the allegation in these two specifications that he had committed carnal knowledge alleged under Article 120, Uniform Code of Military Justice, 10 USC § 920.

of defense counsel's cross-examination of this witness.

The witness in question was Mrs. Julie Holder, a family advocacy therapist at the David Grant Medical Center, Family Advocacy Clinic, Travis Air Force Base, California, who the prosecution offered as an expert on child sex abuse. She opined that it is not unusual for sexually abused children not to report the abuse because the child is often "confus[ed] about how to handle the situation." Her brief substantive testimony on direct examination, covering only four pages in the record, included an explanation of the five phases of the Child Sexual Abuse Accommodation Syndrome as presented by Dr. Roland Summit in a 1983 published study.[2] As Mrs. Holder stated that she had seen the alleged victim one time for approximately 1 hour and Mrs. Holder did not proffer an opinion as to whether the victim fit within this syndrome, defense counsel did not object to Mrs. Holder's credentials as an expert or to her testimony.

On cross-examination, however, defense counsel challenged the authority of Dr. Summit's work, which Mrs. Holder had recited. First, counsel established that Mrs. Holder was "familiar with some critics of that particular work. . . ." Second, without objection by trial counsel, defense counsel relied upon an article by Dr. Lee Coleman, published in the January-February 1986 issue of *Forum* magazine, entitled, "False Allegations of Child Sexual Abuse, How The Experts Have Been Caught With Their Pants Down." Mrs. Holder testified that she thought

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[2] Mrs. Holder presented the five phases of Child Sexual Abuse Accommodation Syndrome as: 1) The abuse is a "secret" that the child should not tell to anyone; 2) The child is helpless—not knowing "where to turn or what to do about" the abuse; 3) The child is "entrap[ped]" in "a symbiotic relationship" with the offender and "accommodate[s] what's happening"; 4) After discovery of the abuse, the child presents a "confusing, conflicting disclosure"; 5) The child can "actual[ly] retract]" the allegation.

that she had "scanned" this article, and counsel used it as a basis to present detailed questions to Mrs. Holder. Defense counsel elicited Mrs. Holder's agreement with Dr. Coleman that the syndrome actually cannot indicate "whether a child has or has not been the victim of sexual abuse." As counsel continued to make references to Dr. Coleman's article, however, Mrs. Holder declined to respond directly to questions about whether Dr. Summit had used the syndrome actually to indicate whether a child has or has not been the victim of sexual abuse, as she had agreed with Dr. Coleman's view could not be done, and whether Dr. Coleman had indicated that children can be subjected to manipulation by adults other than the alleged sexual offender.

At one point, when defense counsel attempted to ask Mrs. Holder if she agreed with a particular statement of Dr. Coleman, trial counsel objected to defense counsel's "reading from an article, that's inadmissible hearsay. . . ." Defense counsel replied that, as Mrs. Holder had testified about one theory regarding child sexual abuse, the defense was attempting to test her expertise by reference to "a particular work" that states "converse theories." The military judge sustained the prosecution's objection, stating, "You may question her about alternative theories not by reading from a book or article, counsel."

With this exchange, defense counsel abandoned any attempt to use Dr. Coleman's material and instead set out to question Mrs. Holder about "a developing idea" regarding child sexual abuse put forth by Dr. Thomas Martin, chief of psychiatry for the Wilford Hall Medical Center at Lackland Air Force Base, Texas. However, when Mrs. Holder stated that she did not know of Dr. Martin, the military judge sustained trial counsel's objection to defense questions about "a developing idea." The military judge instructed defense counsel that he was permitted to ask Mrs. Holder "about the proposition" but prohibited

defense counsel from "elud[ing] [sic] to the authority by someone whom you are manufacturing through a hole cloth [sic] here, and not the testimony of the witness. . . ."

Thus, defense counsel again abandoned any attempt to establish the "proposition" or its authority and moved to an altogether new line of questioning. Defense counsel elicited Mrs. Holder's admission that she had made no diagnosis that the child sexual abuse accommodation syndrome applied to the victim in this case and that she was unable to adress whether the victim's allegations were true.

On redirect examination, Mrs. Holder testified that, based on the information she had, the victim presented nothing inconsistent with someone who might fit the child sexual abuse accommodation syndrome. Defense counsel waived recross-examination.

On appeal appellant asserts that the military judge improperly restricted defense counsel during cross-examination by disallowing defense counsel from reading from Dr. Coleman's article in *Forum* magazine, as the article was a learned periodical encompassed by Mil.R.Evid. 803(18), Manual for Courts-Martial, United States, 1984. We disagree. Because the defense failed to establish the proper evidentiary foundation—that Dr. Coleman's article was a reliable expert publication—we conclude that the military judge properly denied the defense the opportunity to cross-examine Mrs. Holder using this otherwise inadmissible hearsay either as substantive evidence or as a basis of impeachment.

II

A

Mil.R.Evid. 803(18)[3] states that the following is "not

[3] The Military Rule is identical to the Federal Rule except for use of the words "the expert" in lieu of "the expert witness" regarding direct

excluded by the hearsay rule":

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

This rule allows authoritative publications in particular subject areas to be used as substantive evidence, provided certain conditions are met: "[T]here must be a preliminary showing that the" publication's authority "is reliable," and the evidence must be "treated as testimony" and "introduced orally." J. Weinstein & M. Berger, 4 *Weinstein's Evidence* (hereafter *Weinstein's Evidence* § 803(18)[01] at 803-371 and 803-373 (1994). [4]

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examination. Drafter's Analysis to Mil.R.Evid. 803(18), Manual for Courts-Martial, United States, 1984, at A22-50 (Change 2).

[4] Another authority concisely states the requirements of this rule as follows:

> To be used, treatises must be reliable. Reliability can be established throuth the witness' testimony, through subsequent expert testimony, or by judicial notice. If reliable, the treatise can be used on direct examination if relied upon by the expert. The cross-examiner may use the treatise whether or not the expert agrees that it is reliable and whether or not the expert ever has seen the treatise before. A treatise may be read to the finders of fact, but may not be given to them as an exhibit, unless it is not feasible to read the treatise. . . .

S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 804 (3d ed. 1991).

Mil.R.Evid. 803(18) expressly requires that statements in question be published in treatises, periodicals, or pamphlets that are "reliable authority." *See United States v. Jackson,* 38 MJ 106 (CMA 1993), *cert. denied,* 114 S.Ct. 1056 (1994). Thus, the publication must be shown to be one that is "currently accepted and recognized as authority in the profession." E. Imwinkelried, P. Giannelli, F. Gilligan, F. Lederer, *Courtroom Criminal Evidence* § 1228 at 350 (2d ed. 1993).

Mil.R.Evid. 803(18) expressly sets forth the three methods available to establish the authority of the publication: (1) by testimony or admission of the witness, (2) by other expert testimony, or (3) by judicial notice. "The proponent of the treatise [or other publication] may not read from it or question the expert in regard to it except as to its status as an authority, until its authoritativeness has been established to the satisfaction of the trial judge, and its relevancy to a material, consequential fact has been shown." *Weinstein's Evidence, supra,* ¶ 803(18)[02] at 803-377 to 803-378 (footnote omitted). Thus, publication alone does not automatically establish a particular writing as reliable authority; instead, its reliability must be established by proving its authoritative nature via any of the three available means previously mentioned. *Meschino v. North American Drager, Inc.,* 841 F.2d 429, 433-34 (1st Cir. 1988).

Accordingly, the central question in this case is whether defense counsel, as the proponent of the evidence, laid a proper foundation for admission of Dr. Coleman's article as substantive evidence through the hearsay exception of Mil.R.Evid. 803(18). *See Schneider v. Revici,* 817 F.2d 987, 991 (2d Cir. 1987). A determination of the military judge on admissibility of such evidence will not be disturbed absent a clear abuse of discretion. *United States v. Jenkins,* 27 MJ 209 (CMA 1988); *United States v. Mukes,* 18 MJ 358 (CMA 1984). *See also Weinstein's Evidence, supra,* ¶ 803(18)[02] at 803-378.

We conclude that the military judge here did not abuse his discretion in prohibiting cross-examination of Mrs. Holder regarding the published article of Dr. Coleman, because defense counsel failed to establish the proper evidentiary foundation of reliability. Indeed, counsel did not even *attempt* to establish the evidentiary foundation by using any of the three methods authorized by Mil.R.Evid. 803(18). Counsel did establish that Mrs. Holder thought she had "scanned" the article, but this surely was not adequate to establish it as any authority. As defense counsel made no attempt to establish Dr. Coleman's qualifications or the text's status as a standard authority, the military judge properly sustained trial counsel's objection to the text as substantive evidence and prevented defense counsel from "reading from a book or article. . . ." [5]

B

It is equally clear that the military judge did not improperly restrict defense counsel's attempt to impeach Mrs. Holder's testimony by cross-examining her through Dr. Coleman's work. In *Reilly v. Pinkus,* 338 U.S. 269 (1949), the Supreme Court did recognize the right to cross-examine witnesses "concerning statements in other medical books, some of which at least were shown to be respectable authorities." 338 U.S. at 275. The Court reasoned:

It certainly is illogical, if not actually unfair, to per-

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[5] The proper method of laying the evidentiary foundation is presented in a variety of books on evidence and trial practice. *See, e.g.,* E. Imwinkelried, P. Giannelli, F. Gilligan, F. Lederer, *Courtroom Criminal Evidence* § 1229 at 352-53 (2d ed. 1993). Opposing counsel waives any deficiencies in the foundation by failing to object. Mil.R.Evid. 103(a)(1), Manual for Courts-Martial, United States, 1984; *United States v. Jackson,* 38 MJ 106 (CMA 1993), *cert. denied,* 114 S.Ct. 1056 (1994).

> mit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

338 U.S. at 275. Indeed, impeachment with a learned publication is a valid tactic in all jurisdictions. P. Giannelli & E. Imwinkelried, 1 *Scientific Evidence* (hereafter *Scientific Evidence)* § 5-9 at 160 (2d ed 1993); *see, e.g., United States v. Jackson, supra; United States v. Benedict,* 27 MJ 253 (CMA 1988). However, there is some disagreement regarding the conditions under which a publication may be used for this purpose; yet it is clear that a condition precedent to such an impeachment effort is that the cross-examiner establish the publication as a recoganized or reputable authority, through the witness or other means.[6] *See Reilly v. Pinkus, supra* at 275; 1 *Scientific Evidence, supra* at 160; 6 Wigmore, *Evidence* § 1700 at 25 (Chadbourn rev. 1976).

In the present case, as we pointed out earlier, defense counsel failed in any way to establish as reputable authority either Dr. Coleman's article or Dr. Martin's "developing idea." Considering this foundation defect and trial counsel's objections, the judge properly prohibited defense counsel from using this material to impeach Mrs. Holder. [7] In this connection, we note that the military

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[6] This case does not present a need for this Court to decide what means may be used to establish the authority of a publication to be used in cross-examination for impeachment, and the issue was not briefed or argued by the parties. *See generally* Fed.R.Evid 803(18), Commentary, J. Weinstein & M. Berger, 4 *Weinstein's Evidence* ¶ 803(18)[2] at 803-376 to 803-380.

[7] As trial counsel made no objection to defense counsel's initial question to Mrs. Holder regarding Dr. Coleman's article, the military judge could permit defense counsel to question her with respect to this article. *See* Mil.R.Evid. 103(a)(1).

judge did not otherwise limit the defense cross-examination of Mrs. Holder.[8]

III

As the military judge did not abuse his discretion either in excluding the defense proferred hearsay as substantive evidence or in restricting defense cross-examination of Mrs. Holder, we find no merit in appeallant's claim of error.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

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[8] This case is distinguished from *United States v. Banks*, 36 MJ 150 (CMA 1992), where it was error to deny the defense expert witness the opportunity to discuss and to challenge the reliability of references and data previously discussed by the prosecution's expert. *Id.* at 167.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29450

UNITED STATES

v.

STAFF SERGEANT CARLOS COLEMAN, FR261-57-5699
UNITED STATES AIR FORCE

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23 February 1993

Sentence adjudged 9 May 1991 by GCM convened at McClellan Air Force Base, California. Military Judge; William C. Thompson, Jr.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of $550 pay per month for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain David D. Jividen.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Lieutenant Colonel Brenda J. Hollis, Lieutenant Jeffrey T. Infelise, Major Paul H. Blackwell. Jr.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, appellant was convicted by a general court-martial with members of, on divers occasions committing indecent acts with a minor female (AB), and two incidents of attempted carnal knowledge with AB, in violation of Articles 134 and 80, UCMJ. The sentence approved by the convening authority included a bad-conduct discharge, confinement for 3 years, forfeitures of $550 per month for 3 years, and reduction to E-1. We have examined the four assignments of error submitted by appellant and, finding no errors, we affirm.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant claims he was not accorded his Sixth Amendment right to receive effective assistance of trial defense counsel because of the many deficiencies in the assistance he received from his civilian and military trial defense counsel. His laundry list of complaints includes counsel failing to preserve for appellate review a challenge for cause against one of the prospective court members, conceding during opening statement that appellant committed an indecent act, failing to object to hearsay testimony received by a pediatrician from the victim, failing to object to the testimony from a clinical social worker, and finally conceding appellant's guilt to an indecent assault.

The issue of ineffectiveness of counsel is a question of law which is resolved by a review of appellant's alleged errors to determine whether they are so serious that there is a reasonable probability the outcome would have been different had they not occurred. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Cordes,* 33 M.J. 462 (C.M.A. 1991); *United States v. Bono,* 26 M.J. 240 (C.M.A. 1988).

Reversal of a conviction for denial of such assistance requires the appellant show defense counsel's assistance was deficient and the deficiency prejudiced the appellant. We must determine whether the appellant received a fair trial and whether his counsel's performance was reasonable under the circumstances, understanding the acceptable range of performance is wide. *Washington, supra* at 688-91.

The only aspect of appellant's complaint of ineffective assistance of counsel which we believe merits any comment concerns the opening statement and closing arguments on findings. Civilian defense counsel, in opening statement and again in closing argument, admitted appellant committed one sexual "indiscretion" with a minor, AB. Appellant's military trial defense counsel, in an affidavit, responded that these concessions were done with appellant's knowledge and consent in an effort to put forth the defense's theory that only one explainable indecent act occurred, without sexual intercourse. The trial court's findings show the defense strategy was successful in that the appellant was found guilty of only attempted carnal knowledge and not guilty of twice committing wrongful sexual intercourse with a minor, as charged. Applying the *Strickland* test to appellant's arguments, and after reviewing the performance of counsel during the trial, we are convinced that appellant's counsel were not deficient and appellant was not deprived of a fair trial. We find appellant has failed to overcome the strong presumption of counsels' competence. *Washington, supra; United States v. Barnard,* 32 M.J. 530 (A.F.C.M.R. 1990), *pet. denied,* 33 M.J. 484 (C.M.A. 1991).

VERBATIM RECORD

Appellant has submitted several affidavits that state, during the trial, his civilian defense counsel instead of

referring to him as Carlos Coleman, several times inadvertently called appellant, Carlos Murphy. The record of trial does not make reference to these misstatements by civilian defense counsel, thus giving rise to appellant's complaint the record of trial is not verbatim. Assuming appellant is correct in his assertion, we find these misstatements of appellant's name to be insubstantial omissions from a record of trial that do not affect its characterization as a verbatim transcript. *United States v. Lashley,* 14 M.J. 7 (C.M.A. 1982); *United States v. McCullah,* 11 M.J. 234 (C.M.A. 1981); *United States v. Sturkey,* 23 M.J. 522 (A.F.C.M.R. 1986). Given the nature of these omissions and the framework of this trial, we perceive no possibility of prejudice to appellant.

CONCLUSIONS

We have examined appellant's remaining two assignments of error and find them to be without merit. The military judge did not abuse his discretion in limiting civilian defense counsel's cross-examination of a clinical social worker. Mil. R. Evid. 803(18). Appellant was not entitled to proceedings presided over, at the trial and appellate level, by judges with fixed terms. *United States v. Weiss,* ____ M.J. ____, No. 67, 869/MC (C.M.A. Dec. 21, 1992); *United States v. Graf,* 35 M.J. 450 (C.M.A. 1992).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudical to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR